Supreme Court, U.S.
FILED
OCT 28 2004
OFFICE OF THE CLERK

No. 04-585

In The
Supreme Court of the United States

CHARLOTTE KLINGLER, CHARLES WEHNER, and SHEILA BRASHEAR, on behalf of themselves and all others similarly situated,

Petitioners,

vs.

DIRECTOR, DEPARTMENT OF REVENUE, STATE OF MISSOURI,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether Congress has authority under Section 5 of the Fourteenth Amendment to afford rights of access to persons with disabilities as provided in Title II of the Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101, et seq. ("ADA"), and to protect such rights by prohibiting fees on access.

2. Whether Congress has authority under the Commerce Clause to afford rights of access to persons with disabilities as provided in the ADA, and to protect such rights by prohibiting fees on access.

PARTIES TO THE PROCEEDING

The parties to the proceeding for which review is sought are those appearing in the caption of this case. In addition, the named Plaintiffs are representatives of a certified class defined as:

> All purchasers of permanent removable windshield placards, pursuant to Missouri Revised Statutes Section 301.142, since January 26, 1992, and all persons who will in the future be required to pay money for such placards until and unless declaratory and injunctive relief prohibits the requirement of payment as a condition of full access to parking accommodations reserved for persons with disabilities.

Order Recertifying Class at 5. App. 25.

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PETITION FOR WRIT OF CERTIORARI

Petitioners/Plaintiffs Charlotte Klingler, Charles Wehner, and Sheila Brashear, on behalf of themselves and all others similarly situated ("Plaintiffs"), respectfully petition for a writ of certiorari to review the decision in this case of the United States Court of Appeals for the Eighth Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals (App. 1-12) is reported at 366 F.3d 614. The district court's Final Judgment of Declaratory and Injunctive Relief (App. 17-19) is unpublished.

STATEMENT OF JURISDICTION

The decision of the Court of Appeals was entered on May 3, 2004, and was corrected on July 23, 2004. App. 1. Plaintiffs' petition for rehearing and for rehearing en banc, as well as a petition for rehearing and rehearing en banc filed by the United States as intervenor, were denied on August 2, 2004. App. 27. This Court has jurisdiction to review the decision of the Court of Appeals pursuant to 28 U.S.C. § 1254.

CONSTITUTIONAL PROVISIONS AND STATUTES

The questions presented involve the Eleventh and Fourteenth Amendments to the Constitution of the United States, the Commerce Clause of the Constitution of the

United States, the prohibition against disability discrimination in Title II of the ADA at 42 U.S.C. § 12132, Title II's abrogation of Eleventh Amendment immunity at 42 U.S.C. § 12202, and Congress' findings in enacting the ADA which are codified at 42 U.S.C. § 12101. These are each reproduced in the Appendix. App. 28-32.

STATEMENT OF THE CASE

Plaintiffs filed suit in the United States District Court for the Western District of Missouri against the Director of the Department of Revenue for the State of Missouri in his official capacity ("Director"). Plaintiffs' complaint challenges the requirement under Missouri law that a fee be paid in order to receive a placard allowing use of accessible parking. See Mo. Rev. Stat. § 301.142. Plaintiffs alleged that the placard fee is a facially discriminatory fee on access which violates 42 U.S.C. § 12132.

The district court agreed that the placard fee violates Title II. *McGarry v. Missouri Dep't of Revenue,* 7 F.Supp. 2d 1022 (W.D. Mo. 1998), *dismissed for lack of federal jurisdiction,* 1999 U.S. Dist. LEXIS 22222 (W.D. Mo. 1999), *reversed,* 281 F.3d 776 (8th Cir. 2002), *appeal after remand,* 366 F.3d 614 (8th Cir. 2004).[1] However, the

[1] The district court's ruling in this regard is in accord with decisions entered in a number of other similar challenges to state fees on the exercise of ADA mandated rights of access. See *Dare v. California,* 191 F.3d 1167, 1171-73 (9th Cir. 1999), *cert. denied,* 531 U.S. 1190 (2001); *Thompson v. Colorado,* 29 F.Supp.2d 1226 (D. Colo. 1998), *vacated for lack of jurisdiction,* 258 F.3d 1241 (10th Cir. 2001), *cert. denied,* 535 U.S. 1077 (2002), *appeal after remand,* 60 Fed. Appx. 212 (10th Cir. 2003); *Duprey v. Connecticut,* 28 F.Supp.2d 702 (D. Conn. 1998); *Thrope v. Ohio,* 19 F.Supp.2d 816 (S.D. Ohio 1998); Joseph

(Continued on following page)

district court later vacated this ruling and dismissed the case in reliance on *Alsbrook v. City of Maumelle,* 184 F.3d 999 (8th Cir. 1999) (en banc), *cert. dismissed,* 529 U.S. 1001 (2000). In *Alsbrook,* the Eighth Circuit held that the abrogation of Eleventh Amendment immunity for claims under Title II, as codified in 42 U.S.C. § 12202, is constitutionally invalid.

Plaintiffs appealed the order of dismissal to the Eighth Circuit, which affirmed the dismissal of Plaintiffs' claim for reimbursement of illegally collected placard fees, but reversed the district court's ruling that Plaintiffs could not obtain declaratory and injunctive relief against the Director. *Klingler v. Director,* 281 F.3d 776 (8th Cir. 2002).

On remand, the district court entered an order certifying the class of Missouri placard purchasers. App. 20-26. The district court also reaffirmed its prior conclusion that the placard fee violates Title II. On this basis, the district court entered final judgment of declaratory and injunctive relief in favor of the certified class. App. 17-19. The Director appealed the final judgment asserting two issues: (1) whether Title II prohibits the fee required for placards allowing use of accessible parking spaces; and (2) whether the prohibition of fees on access exceeds Congress' power under Section 5 of the Fourteenth Amendment.

In resolving the appeal, the Eighth Circuit panel noted that any Section 5 basis for Congressional authority to enact Title II had been foreclosed by its earlier ruling in

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Groshong, *Curbing State Discrimination Against Disabled Drivers: Why the Disabled Need Not Pay to Participate in Disabled Parking Programs,* 33 Seton Hall L. Rev. 811 (2003).

Alsbrook. App. 4.[2] The Court then analyzed whether the Commerce Clause authorized Congress to prohibit fees on the rights of access afforded in the ADA, and concluded that this prohibition was not within the power to regulate commerce. App. 5-12.[3] As a result, the Court concluded that the prohibition of fees on access could not even be enforced prospectively by declaratory and injunctive relief against the Director in his official capacity, as authorized by *Ex parte Young,* 209 U.S. 123 (1908). App. 12. Judge Richard S. Arnold dissented, stating that he would affirm the district court. App. 12-16.

Plaintiffs and the United States petitioned for rehearing and for rehearing en banc, which petitions were denied on August 2, 2004. App. 27. This petition timely followed.

REASONS FOR GRANTING CERTIORARI

The ruling of the United States Court of Appeals for the Eighth Circuit that Plaintiffs' Title II claims are not within Congress' authority under Section 5 of the Fourteenth Amendment merits additional review in light of the subsequently issued decision of this Court in *Tennessee v. Lane,* 124 S.Ct. 1978 (2004). The ruling that Plaintiffs' claims are not within Congress' power to regulate commerce is also likely to merit additional review in light of the anticipated decision of this Court in its review of *Raich*

[2] The Eighth Circuit's decision in this regard was without benefit of the subsequent decision of this Court in *Tennessee v. Lane,* 124 S.Ct. 1978 (2004).

[3] The Eighth Circuit reached this issue even though it had not been raised by the Director before the district court or as an issue on appeal.

v. Ashcroft, 352 F.3d 1222 (9th Cir. 2003), *cert. granted*, 124 S.Ct. 2909 (2004). The ruling as to Section 5 merits review for the additional reasons that: (1) the Circuits continue to be conflicted over the extent to which Title II is a legitimate exercise of Congressional power under Section 5; and (2) the ruling raises a question of exceptional importance. The ruling that Plaintiffs may not obtain even declaratory and injunctive relief based upon the Eighth Circuit's Commerce Clause interpretation also merits review because: (1) the decision conflicts with existing precedent of all other Circuits on the enforceability of Title II by declaratory and injunctive relief; and (2) the issue is one of exceptional importance.

I. Case Should Be Further Considered In Light Of *Tennessee v. Lane*

The Court of Appeals rendered its decision on May 3, 2004. App. 1. The decision rejected the possibility that Plaintiffs' Title II claims could be within Congress' Section 5 power, following binding Eighth Circuit precedent in *Alsbrook* that Title II claims are not, under any circumstances, within that power. App. 4. In *Alsbrook*, the Eighth Circuit concluded that Title II claims were not within the Section 5 power on the reasoning that there was no record of disability discrimination by the States sufficient to allow Section 5 legislation. *Alsbrook*, 184 F.3d at 1009 ("it cannot be said that Title II identifies or counteracts particular state laws or specific state actions which violate the constitution").

On May 17, 2004, this Court issued its decision in *Tennessee v. Lane*. *Lane* indicates that the history of

disability discrimination considered by Congress was more than adequate to justify legislation pursuant to Section 5:

> The conclusion that Congress drew from this body of evidence is set forth in the text of the ADA itself: "[D]iscrimination against individuals with disabilities persists in such critical areas as . . . education, transportation, communication, recreation, institutionalization, health services, voting, and *access to public services*." 42 U.S.C. § 12101(a)(3) (emphasis added). This finding, together with the extensive record of disability discrimination that underlies it, makes clear beyond peradventure that inadequate provision of public services and access to public facilities was an appropriate subject for prophylactic legislation.

Lane, 124 S.Ct. at 1992. The decision of the Court of Appeals, relying on *Alsbrook,* holds to the contrary, assuming that there was no record of inadequate accessibility of public services and facilities to support prophylactic Section 5 legislation.

Because the decision of the Eighth Circuit is contrary to the subsequent decision of this Court in *Lane,* Plaintiffs ask that the Court grant the petition for writ of certiorari, vacate the decision of the Court of Appeals, and remand for further consideration in light of *Lane.* This is the approach the Court took with respect to a number of petitions pending at the time of the decision in *Lane* – including a petition involving a challenge to Florida's placard fee. See *Spencer v. Easter,* 124 S.Ct. 2386 (2004); *Rendon v. Florida Dep't of Hwy. Safety & Motor Vehicles,* 124 S.Ct. 2387 (2004) (involving challenge to placard fee); *Columbia River Corr. Inst. v. Phiffer,* 124 S.Ct. 2386 (2004); *Feaster v. Florida Dep't of Health,* 124 S.Ct. 2387 (2004); *Kiman v. N.H. Dep't of Corr.,* 124 S.Ct. 2387 (2004);

Parr v. Middle Tenn. State Univ., 124 S.Ct. 2386 (2004). Like each of the decisions this Court vacated following *Lane*, the decision of the Eighth Circuit was issued prior to *Lane*, and passed upon the constitutionally of Congress' abrogation of Eleventh Amendment immunity for Title II. We are aware of no reason that a different approach should be followed here.

II. Case Should Be Further Considered In Light Of Anticipated Ruling In *Raich v. Ashcroft*

The issue of the scope of Congressional power to regulate commerce is now before the Court on review of the Ninth Circuit's decision in *Raich v. Ashcroft*, which holds that the Controlled Substances Act, 21 U.S.C. § 801 et seq., could not be constitutionally applied to individuals involved in the noncommercial intrastate cultivation, possession, and use of marijuana for medical purposes. In reaching this conclusion, the Ninth Circuit adopted a rationale emphasizing a "narrow categorization of the appellants' activity." *Raich*, 352 F.3d at 1228. Continuing, the Ninth Circuit rejected the suggestion that the aggregation principle could apply to noncommercial activities. *Id.* at 1230.

The restrictive views of Congressional power to regulate commerce exemplified by the Ninth Circuit's decision in *Raich* echo views stated by the Eighth Circuit in this case. We anticipate that the decision of this Court in *Raich* will shed considerable light on the propriety of these views. It would be appropriate to further consider the Commerce Clause issue of this case in that light.

Accordingly, at the least, Plaintiffs ask the Court to hold this petition until such time as a ruling is made in

Raich v. Ashcroft. Upon such ruling, Plaintiffs ask that the decision of the Eighth Circuit be vacated and this case remanded for further consideration in light of the decision of this Court in *Raich.*

III. Courts Are In Conflict

The Eighth Circuit's decision that Plaintiffs are not entitled to even declaratory and injunctive relief to enforce their Title II rights conflicts with decisions by every other appellate court which has reached the issue. See *Miller v. King,* 2004 U.S. App. LEXIS 19250, *32-*37 (11th Cir. Sept. 14, 2004); *McCarthy v. Hawkins,* 381 F.3d 407, 412-14 (5th Cir. 2004); *Chaffin v. Kansas State Fair,* 348 F.3d 850, 866-67 (10th Cir. 2003); *Henrietta D. v. Bloomberg,* 331 F.3d 261, 288-89 (2d Cir. 2003), *cert. denied,* 124 S.Ct. 1658 (2003); *Miranda B. v. Kitzhaber,* 328 F.3d 1181, 1187-88 (9th Cir. 2003); *Bruggeman v. Blagojevich,* 324 F.3d 906, 912-13 (7th Cir. 2003); *Carten v. Kent State Univ.,* 282 F.3d 391, 396-97 (6th Cir. 2002). These decisions each agree that Title II rights may be enforced via an official capacity suit for declaratory and injunctive relief.[4]

We recognize that these decisions allowing claims for declaratory and injunctive relief against state officials do not expressly consider the Commerce Clause issue on which the Eighth Circuit based its ultimate ruling. However, the Eighth Circuit's decision that Title II is not valid Commerce Clause legislation is also contrary to every

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[4] The singular exception, *Walker v. Snyder,* 213 F.3d 344 (7th Cir. 2000), *cert. denied,* 531 U.S. 1190 (2001), was disapproved by the Seventh Circuit on this issue in *Bruggeman,* 324 F.3d at 912-13. See also *Radaszewski v. Maram,* 383 F.3d 599 (7th Cir. 2004).

appellate court decision we have found that speaks to this issue. See *Walker v. Snyder,* 213 F.3d at 346 ("commerce clause gives Congress ample authority to enact the ADA"); *Stanley v. Litscher,* 213 F.3d 340, 343-44 (7th Cir. 2000).[5]

The courts also continue to be conflicted over the proper analysis of whether a particular Title II claim is within Congress' Section 5 power. Some courts continue to follow a relatively limited view of Congress' Section 5 power to address disability discrimination. See *Miller,* 2004 U.S. App. LEXIS at *67 (immunity from Title II claim by state prisoner was not within Section 5 power based on conclusion that "Title II's affirmative duty to accommodate qualified, disabled prisoners is markedly different than, and cannot be said to be 'perfectly consistent with,' traditional protections afforded by the Eighth Amendment").[6] On the other hand, the Ninth Circuit appears to find *Lane* as vindicating its view that Congress' abrogation of immunities for Title II claims is generally constitutional. See *Phiffer v. Columbia River Corr. Inst.,* 2004 U.S. App. LEXIS 19152 (9th Cir. Sept. 13, 2004).

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[5] See also Groshong, supra note 1, at 829-36. Cf. *United States v. Mississippi Dep't of Pub. Safety,* 321 F.3d 495, 499-501 (5th Cir. 2003). The only support we find for the panel majority on this issue is contained in a dissenting opinion. See *McCarthy,* 381 F.3d at 426-33 (Garza, J., dissenting).

[6] See also *Spencer v. Easter,* 2004 U.S. App. LEXIS 20298, *3 (4th Cir. Sept. 21, 2004) ("it appears that the actual holding is fairly narrow and is limited 'to the class of cases implicating the fundamental right of access to the courts'") (quoting *Lane,* 124 S.Ct. at 1994); *Johnson v. Southern Conn. State Univ.,* 2004 U.S. Dist. LEXIS 21084, *13 (D. Conn. Sept. 30, 2004) ("in the wake of *Lane,* it appears that a private suit for money damages under Title II of the ADA may be maintained against a state only if the plaintiff can establish that the Title II violation involved a fundamental right").

Thus, the decision below presents conflicts with other Courts of Appeals over whether Title II claims may be enforced pursuant to *Ex parte Young* by an action for prospective relief, whether Title II is legitimate Commerce Clause legislation, and over the framework of analysis to apply in determining whether a particular Title II claim is within Congress' Section 5 authority. For each of these reasons, in the event this Court does not simply vacate and remand for further consideration in light of *Lane* or the anticipated decision in *Raich*, the issues presented are worthy of review by this Court.

IV. Issues Presented Are Of Exceptional Importance

The enforceability of rights under Title II, the asserted immunities of the States from the enforcement of such rights, and Congress' powers to enforce the Fourteenth Amendment and to regulate commerce, are each matters of unquestionable importance. The importance of the issues presented by this petition is reflected in part by the substantial attention given by this Court to disability rights issues in the last several terms, as well as the Court's regular consideration in recent years of state immunity issues, and of issues considering Congress' power to abrogate state immunities.[7]

Congress' findings also demonstrate the importance of the issue. Congress found disability discrimination continues to be a serious and pervasive social problem, which

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[7] See *Lane*, supra; *Board of Trustees v. Garrett*, 531 U.S. 356 (2001); *Hason v. Medical Board*, 279 F.3d 1167 (9th Cir. 2002), *cert. dismissed*, 538 U.S. 958 (2003); *Kimel v. Florida Bd. of Regents*, 139 F.3d 1426 (11th Cir. 1998), *cert. dismissed*, 528 U.S. 1184 (2000); *Alsbrook*, supra.

persists in such areas as public accommodations, education, transportation, recreation, health services, voting, and access to public services. See 42 U.S.C. § 12101(a). Inherent is the right of persons with disabilities to participate in each of these areas as a witness, an accused, a juror, a student, a traveler, a participant, a patient, a voter, and a citizen.

CONCLUSION

Based on the foregoing, Plaintiffs ask that this Court grant this petition for writ of certiorari, vacate the decision of the Court of Appeals, and remand for further consideration in light of *Tennessee v. Lane.* In the alternative, Plaintiffs ask this Court to hold this petition until a decision is rendered in *Raich v. Ashcroft,* and thereupon vacate the decision below and remand for reconsideration in light of *Raich v. Ashcroft,* and/or *Tennessee v. Lane.* In

the alternative, Plaintiffs ask this Court to grant this petition for writ of certiorari on the questions presented.

Respectfully submitted,

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United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 03-2345

Charlotte Klingler; Charles Wehner; Sheila Brashear, Appellees, v. Director, Department of Revenue, State of Missouri, Appellant.	* * * * * * * * * *	Appeal from the United States District Court for the Western District of Missouri.

Submitted: January 12, 2004

Filed: May 3, 2004 (corrected 7/23/04)

Before WOLLMAN, RICHARD S. ARNOLD, and MORRIS SHEPPARD ARNOLD, Circuit Judges.

MORRIS SHEPPARD ARNOLD, Circuit Judge.

In Missouri, physically disabled people who pay a $2.00 annual fee to the state revenue department may obtain permanent removable windshield placards authorizing them to use reserved accessible parking spaces. The plaintiffs, a class of all who have purchased, or will purchase, such placards, sought a declaration that the charge of a fee for the placards violates Title II of the Americans

With Disabilities Act (ADA), *see* 42 U.S.C. §§ 12131-12165, an injunction against further collection of the placard fee by the Director of the Missouri Department of Revenue (Director), and monetary damages. In an earlier appeal, *Klingler v. Director, Dep't of Revenue*, 281 F.3d 776, 777 (8th Cir. 2002) (per curiam), we affirmed a dismissal of the plaintiffs' claim for damages, but held that they could seek declaratory and injunctive relief against the Director under the doctrine of *Ex parte Young*, 209 U.S. 123 (1908), and remanded the case to the district court.

The district court, following cross-motions for summary judgment, granted the declaratory and injunctive relief sought, concluding that the fee charged to the plaintiffs violated the surcharge prohibition of 28 C.F.R. § 35.130(f), a regulation promulgated by the Department of Justice (DOJ) under the authority of the ADA, *see* 42 U.S.C. § 12134. The Director appeals, arguing that her collection of the placard fee is not prohibited by the ADA and that, even if it were, such a prohibition would not be a constitutionally valid exercise of congressional power. We review the district court's grant of summary judgment for the plaintiffs *de novo*, *see Tindle v. Caudell*, 56 F.3d 966, 969 (8th Cir. 1995), and reverse.

I.

Certain parking spaces in Missouri that are close to entrances of buildings are reserved for the exclusive use of physically disabled people. *See* Mo. Rev. Stat. § 301.143. Missouri law authorizes a motor vehicle containing a physically disabled occupant to park in one of these accessible parking spaces if the vehicle displays either a specially marked license plate, *see* Mo. Rev. Stat.

§ 301.142.3, or a removable windshield placard, *see* Mo. Rev. Stat. § 301.142.5. A person parking a vehicle in a space reserved for disabled people who fails to display a disabled license plate or placard shall be fined, and the vehicle may be towed. *See* Mo. Rev. Stat. § 301.143.4. An application for a disabled license plate or windshield placard must be made to the Director and must be accompanied by a statement signed by a physician that certifies that the relevant person is "physically disabled" as defined by Mo. Rev. Stat. § 301.142.1. *See* Mo. Rev. Stat. § 301.142.6. A disabled license plate may be obtained at no additional fee beyond that ordinarily charged for license plates, *see* Mo. Rev. Stat. § 301.142.4, but there is a fee of $2.00 per year charged for each windshield placard, *see* Mo. Rev. Stat. § 301.142.5.

The plaintiffs successfully argued below that Title II of the ADA and a regulation promulgated by the DOJ to enforce the ADA, *see* 28 C.F.R. § 35.130(f), prohibit the collection by the Director of the $2.00 annual fee for the placards. Title II of the ADA states, in relevant part, that "no qualified individual with a disability shall, by reason of such disability, . . . be subjected to discrimination by [a public] entity." 42 U.S.C. § 12132. Congress directed the DOJ to promulgate regulations for the implementation of Title II of the ADA. *See* 42 U.S.C. § 12134(a). The regulation relied on by the plaintiffs and the district court is a specific application of the nondiscrimination mandate of Title II. The regulation expressly prohibits public entities from placing a "surcharge" on a disabled person or any group of disabled people "to cover the costs of measures . . . that are required to provide [those individuals] with the nondiscriminatory treatment required by the [ADA]." 28 C.F.R. § 35.130(f).

To determine whether the fee involved in this case violates Title II, we would need to decide whether the measure for which Missouri levies the fee is "required to provide that individual or group . . . nondiscriminatory treatment" as mandated by the ADA and, if so, whether the fee for the measure is a "surcharge." *See* 28 C.F.R. § 35.130(f); *Dare v. California*, 191 F.3d 1167, 1171 (9th Cir. 1999), *cert. denied*, 531 U.S. 1190 (2001). We realize that the Supreme Court has advised that "[w]here a case . . . can be decided without reference to questions arising under the Federal Constitution, that course is usually pursued and is not departed from without important reasons." *Siler v. Louisville & N.R. Co.*, 213 U.S. 175, 193 (1909). But we believe that this is one of those rare occasions where the appropriate resolution of the constitutional issue is reasonably straightforward and determinate and the resolution of the statutory issue is, by contrast, difficult and complex. *See, e.g., D'Almeida v. Stork Brabant B.V.*, 71 F.3d 50, 51 (1st Cir. 1995) (per curiam), *cert. denied*, 517 U.S. 1168 (1996). We thus proceed directly to the constitutional question, and conclude that the application of Title II to the present circumstances would not be a constitutionally valid exercise of congressional power.

II.

We have held that "the extension of Title II of the ADA to the states was not a proper exercise of Congress's power under Section 5 of the Fourteenth Amendment." *Alsbrook v. City of Maumelle*, 184 F.3d 999, 1010 (8th Cir. 1999) (en banc). The plaintiffs concede that, but they contend that Title II, as applied to the Director, is a constitutional exercise of Congress's Article I power to

"regulate Commerce . . . among the several States," U.S. Const., art. I, § 8, cl. 3.

The Supreme Court has held that Congress may regulate three broad categories of activity under its commerce power: "use of the channels of interstate commerce"; persons, things, and instrumentalities in interstate commerce; and intrastate "activities that substantially affect interstate commerce." *United States v. Lopez*, 514 U.S. 549, 558-59 (1995). Because the disabled placard fee clearly does not fit within either of the first two *Lopez* categories, the relevant inquiry is whether Missouri's placard fee "substantially affects" interstate commerce.

The plaintiffs argue that Title II is a legitimate exercise of congressional power under the commerce clause. We think that the issue is more properly understood, though, not as whether the commerce clause gives Congress authority to enact Title II in the first place, but as whether the statute's application to the regulated activity in the case at hand is a valid one. *See United States v. Stewart*, 348 F.3d 1132, 1140-42 (9th Cir. 2003). As the Supreme Court stated in *Lopez*, 514 U.S. at 559, "the proper test requires an analysis of whether the regulated activity 'substantially affects' interstate commerce."

In *United States v. Morrison*, 529 U.S. 598 (2000), the Supreme Court provided guidance for determining whether a statute regulates intrastate activity that "substantially affects" interstate commerce. We must consider whether the regulated activity is commercial or economic in nature; whether the statute contains an "express jurisdictional element that might limit its reach to a discrete set" of cases; whether the statute or its legislative

history contains "express congressional findings" regarding the effects of the regulated activity upon interstate commerce; and whether the link between the regulated activity and a substantial effect on interstate commerce is "attenuated." *Id.* at 609-13 (internal quotations omitted). We conclude that all four of the considerations identified in *Morrison* favor a finding that the application of Title II to the facts of this case would be unconstitutional under the commerce clause.

A.

The first question that we ask in determining whether the regulated activity substantially affects interstate commerce is whether the regulated activity is commercial or economic in nature. The Supreme Court recognized in both *Lopez* and *Morrison* that the question whether an intrastate activity is commercial or noncommercial may generate "legal uncertainty." *Lopez*, 514 U.S. at 566, *quoted in Morrison*, 528 U.S. at 610. The Director's challenged activity does involve the collection of money, and can thus perhaps be classified as "economic" in a sense. But we agree with eight judges of an evenly-divided Fifth Circuit that "since what we are concerned with is the power of Congress . . . 'to regulate Commerce . . . among the several States' . . . 'commercial' rather than simply any broadly understood concept of 'economic' seems to be the appropriate concept." *United States v. McFarland*, 311 F.3d 376, 396 (5th Cir. 2002) (en banc), *cert. denied*, 123 S. Ct. 1749 (2003). We do not see how the Director's activity of non-profit revenue collection for state reasonably be deemed a "commercial" activity. The relevant question seems to be whether the regulated activity is commercial in the sense of being closely connected to some national

commercial market, and the Director's collection of the placard fee for state services cannot fairly be so classified.

B.

We ask next whether the statute included an express jurisdictional element in order to limit its reach to a distinct set of activities that can be appropriately regulated under the commerce clause. "Such a jurisdictional element may establish that the enactment is in pursuance of Congress' regulation of interstate commerce." *Morrison*, 529 U.S. at 612. The absence of such a jurisdictional element, though, might indicate that a statute is overinclusive, unconstitutionally sweeping within its ambit activities that have no explicit connection with or effect on interstate commerce. Title II of the ADA includes no requirement of a case-by-case showing of a nexus between the regulated activity and interstate commerce.

C.

The next question is whether Congress made express findings about the effects of the proscribed activity on interstate commerce. In enacting the ADA, Congress expressly invoked the commerce clause power, stating: "It is the purpose of this chapter . . . to invoke the sweep of congressional authority, including the power . . . to regulate commerce, in order to address the major areas of discrimination faced day-to-day by people with disabilities." 42 U.S.C. § 12101(b)(4). Congress also stated in the ADA its "finding" that "the continuing existence of unfair and unnecessary discrimination and prejudice [against people with disabilities] . . . costs the United States billions of dollars in unnecessary expenses resulting from

dependency and nonproductivity." 42 U.S.C. § 12101(a)(9). The legislative history contains additional legislative findings regarding the effects of disability discrimination on the economy. For instance, the report of the House Committee on Education and Labor concludes that disability discrimination creates unnecessary shortages in the labor pool while costing the government billions of dollars in unnecessary welfare programs. *See* H.R. Rep. No. 101-485 (II), at 43-47 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 325-29.

Even assuming that these findings identifying the effects of disability discrimination on interstate commerce are factually accurate, there were no findings that the type of parking placard fees being regulated here, substantially affect interstate commerce. While express congressional findings are not required, such findings are helpful where a substantial effect on interstate commerce is not evident "to the naked eye." *Lopez*, 514 U.S. at 563. A substantial relation between Missouri's placard fee and interstate commerce is not obvious to us, and the findings describing the general economic effects of discrimination against disabled people do not lend much support to the conclusion that the exercise of congressional power to prohibit the Director's collection of the $2.00 annual placard fee is proper.

D.

The final question is whether the link between Missouri's $2.00 annual disabled placard fee and any substantial effect on interstate commerce is attenuated. In their brief, the plaintiffs attempt to justify the regulation of Missouri's placard fee under the commerce clause by

arguing that Title II is "designed to eradicate barriers limiting the ability of persons with disabilities to engage in commerce," that "[e]nabling people to get into stores is at the core of Congress' power to regulate commerce," and that "[i]n regulating commerce, Congress may prohibit States from enacting fees and taxes which encumber commerce."

We agree that a person in Missouri whose mobility is impaired by a physical disability can engage in many economic transactions more flexibly and conveniently with a placard than without a placard. Unlike license plates that indicate disability (which disabled Missourians can obtain at no extra charge), windshield placards are portable and thus allow disabled people to use accessible parking spaces when riding with others, or when driving another person's car or a rental car. In a sense, then, the lack of a placard can be considered a "barrier" hampering the ability of disabled people to participate in interstate commerce. The question at issue, however, is not whether a complete absence of disabled placards would substantially affect interstate commerce, but whether the imposition of a $2.00 annual charge on each placard would substantially affect interstate commerce.

The plaintiffs analogize the prohibition of the $2.00 annual placard fee to the "similar efforts to integrate groups previously excluded from commerce" that were upheld by the Supreme Court under the commerce clause in *Heart of Atlanta Motel, Inc., v. United States*, 379 U.S. 241 (1964), and *Katzenbach v. McClung*, 379 U.S. 294 (1964). In *Heart of Atlanta*, the Supreme Court held that Title II of the Civil Rights Act of 1964, which, as relevant,

bars racial discrimination by places of "public accommodation," *see* 42 U.S.C. § 2000a, was a constitutional exercise of congressional power under the commerce clause "as applied . . . to a motel which concededly serves interstate travelers." *Heart of Atlanta*, 379 U.S. at 242, 247, 261. In *Katzenbach*, the Court held that the same statutory provision was a valid exercise of congressional power "as applied to a restaurant annually receiving about $70,000 worth of food which has moved in commerce." *Katzenbach*, 379 U.S. at 298, 304-05.

We think that the effect of Missouri's placard fee on interstate commerce is much more speculative and tenuous than that of the racial discrimination at issue in *Katzenbach* and *Heart of Atlanta.* The Supreme Court, in *Katzenbach* and *Heart of Atlanta*, validated under the commerce clause the prohibition of restaurants and motels turning away willing customers because of their race. The discriminatory activities targeted in these two cases were blocking a great number of potential economic transactions that would have occurred but for the discrimination and undoubtedly had a substantial aggregate affect on interstate commerce. Even if the transactions prevented by the racial discrimination would have been largely shifted to other commercial outlets, interstate commerce would, in the aggregate, be substantially affected by all of these disrupted and shifted transactions.

Racially exclusive policies at restaurants and hotels presented an insuperable barrier blocking the ability of many people to complete economic transactions at those establishments. The nominal placard fee, in contrast, is unlikely to deter any significant number of people, who would obtain placards if they were free, from purchasing

them and thus acquiring the enhanced ability to engage in economic transactions that the placards might afford. Even if the Director provided the placards free of charge, disabled people would have to expend time and effort in applying for them at the Missouri Department of Revenue and getting a doctor's note, which requirements the plaintiffs do not challenge here. Considering the significant benefits conferred by the placards, we are unable to conclude that the additional minimal burden of the $2.00 annual fee would reduce the number of placard-possessing disabled people to such an extent that interstate commerce would be substantially affected.

There is one way in which the Director's collection of the placard fee could be deemed to affect interstate commerce substantially. The Director collects a total of about $400,000 per year in revenue from the placard fees. In "society is an elastic medium which transmits all tremors throughout its territory," *United States v. A.L.A. Schechter Poultry Corp.*, 76 F.2d 617, 624 (2d Cir. 1935) (Hand, J., concurring), and the money annually collected by the Director ($2.00 out of the pocket of each of thousands of disabled people) would have gone somewhere else in the economy had the Director not collected it. One could reasonably presume that a sizeable portion of the money that the Director collected would, in the absence of the placard fee, have ended up flowing through the various channels of interstate commerce. This effect on interstate commerce, however, seems to be "so indirect and remote that to embrace [it], in view of our complex society, would effectually obliterate the distinction between what is national and what is local." *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37 (1937). The mere fact that $2.00 paid to a state government for a placard might otherwise

have been spent in a manner that affected interstate commerce is too attenuated to justify the inference that the $2.00 fee itself "substantially affects" interstate commerce in a manner justifying federal regulation.

III.

For the reasons stated, we reverse the district court's grant of the plaintiffs' motion for summary judgment, and its award of declaratory and injunctive relief, and we remand the case to the district court for entry of a judgment consistent with this opinion.

RICHARD S. ARNOLD, Circuit Judge, dissenting.

With respect, I disagree with the Court's conclusion that Congress lacks power under the Commerce Clause to prohibit Missouri's imposition of a $2.00 fee for disabled-parking placards. I also believe that the $2.00 fee imposed on disabled individuals seeking a disabled-parking placard is a surcharge that violates Title II and 28 C.F.R. § 35.130(f). Therefore, I would affirm the judgment of the District Court.

I believe the Court takes too narrow a view of what activity is being regulated by Title II. The Court states that "[t]he nominal placard fee . . . is unlikely to deter any significant number of people, who would obtain placards if they were free, from purchasing them and thus acquiring the enhanced ability to engage in economic transactions that the placards might afford." *Ante*, at 9. By taking this narrow view, the Court concludes that the fee has no substantial impact on interstate commerce because only

some small, unknown number of disabled individuals who cannot pay the fee, or will not pay the fee, are denied the opportunity to participate in economic transactions. Although the Court concedes that certain disabled individuals would be denied the opportunity to participate in certain aspects of interstate commerce because they would not otherwise have access to places where such activity occurs, the Court holds that the number of disabled individuals who would be denied access is so insignificant that it does not have the requisite "substantial impact" on interstate commerce.

Congress could not possibly make express findings about every situation to which the ADA might be extended, nor is it required to do so under the Commerce Clause. Congress did, however, express its intent that disabled individuals not be subjected to discriminatory treatment, and the Department of Justice, in exercising its delegated authority, promulgated § 35.130(f) to ensure that disabled individuals were not required to pay for their right to reasonably equivalent access. I believe that the Court overlooks the fact that those disabled individuals who pay the fee are being required to pay for their access to interstate commerce while non-disabled individuals are not.

It is an axiom cherished by many economists that, all other things being equal, an increase in the cost of a certain kind of activity will decrease the amount of that activity. As I read the Court's opinion, it does not deny the validity of that axiom in general. Rather, it concludes that the decrease in shopping, say, by disabled individuals is simply not substantial enough to justify Congress's exercise of power under the Commerce Clause. This approach seems to me wrong in two ways. First, the amount of the

decrease in economic activity is treated as an ordinary fact to be proved by a preponderance of the evidence by the party bearing the burden of proof, here the plaintiffs. I agree that the record is devoid of evidence quantifying the amount of commercial activity – say, sales – that will be delayed or eliminated by placing a charge on the disabled-parking placards. This analysis, however, in my view, mischaracterizes the kind of "fact" we deal with here. What is at stake is a question of "legislative fact," the kind of fact that is expressly or implicitly "found" by a legislative body when it enacts a law, rather than "judicial fact," the kind of fact that has to do with who did what and the effect that activity had on the parties to the case.

When dealing with legislative facts, I think, even in the absence of express findings, we owe it to Congress to assume the existence of any state of facts reasonably conceivable by the legislature at the time the statute was enacted. The view that a substantial amount of commercial activity would be affected by this charge is certainly not arbitrary or unreasonable. We should give Congress the benefit of the doubt. When the constitutionality of a statute is challenged and "the legislative judgment is drawn in question," judicial review "must be restricted to the issue whether any state of facts either known or which could reasonably be assumed" supports such statute. *United States v. Carolene Prods. Co.*, 304 U.S. 144, 154 (1938). Furthermore, although express findings may at times aid courts in reviewing the connection between a statute or regulation and interstate commerce, "Congress normally is not required to make formal findings as to the substantial burdens that an activity has on interstate commerce." *United States v. Lopez*, 514 U.S. 549, 562 (1995).

There are cases upholding statutes and regulations that were adopted without express findings about their impact upon interstate commerce. For example, in *Gibbs v. Babbitt*, 214 F.3d 483 (4th Cir. 2000), the Fourth Circuit upheld a regulation prohibiting the taking of red wolves on private property promulgated under the Endangered Species Act. Although the Court recognized that there were no formal findings with regard to the impact of the regulation on interstate commerce, the Court recognized that it must "take account of congressional judgment and the judgment of the agency designated to implement the statute." *Gibbs*, 214 F.3d at 493 n.3. As a second example, the Seventh Circuit recently held that 18 U.S.C. § 2252(a)(4)(B) (possession of child pornography) was a constitutionally permissible exercise of Congress's power under the Commerce Clause despite the lack of express congressional findings because "Congress could have rationally reasoned" that intrastate possession of child pornography affects the interstate market for child pornography. *United States v. Angle*, 234 F.3d 326, 337 (7th Cir. 2000). In this case, Congress rationally could have found that the number of individuals deterred by the $2.00 fee from engaging in interstate commerce was substantial. It is certainly not obvious to me that the amount of economic activity affected here is insignificant or *de minimis*.

Moreover, I find the Court's attempt to distinguish the racial-discrimination cases, *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964), and *Katzenbach v. McClung*, 379 U.S. 294 (1964), unconvincing. It is true that the effect on commerce considered in those two cases was more pronounced. That is, Congress was attempting to override an absolute prohibition against participation in a certain economic activity based on a prospective patron's

race. Here, disabled individuals are not kept out of the store altogether; rather the state has made it more difficult for them to enter the store. The difference in the two situations, I think, is one of degree rather than kind. I do not believe that this difference justifies making a distinction for Commerce Clause purposes.

The State of Missouri has made it more costly for certain disabled individuals to gain convenient access to places of business where commercial activity affecting interstate commerce is taking place. Congress has prohibited such state action by statute, and the prohibition has been made explicit by regulation. Automobiles and department stores are the very stuff of interstate commerce. For these reasons, I respectfully dissent. I would affirm the judgment of the District Court.

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
CENTRAL DIVISION

CHARLOTTE KLINGLER, et al.,	)	
Plaintiffs,	)	
v.	)	No. 96-4249-CV-C-WAK
DIRECTOR, DEPARTMENT OF REVENUE, STATE OF MISSOURI,	)	
Defendant.	)	

FINAL JUDGMENT OF DECLARATORY AND INJUNCTIVE RELIEF

In May 1998, this Court ruled that fees charged by the State of Missouri Department of Revenue for permanent removable windshield placards allowing use of accessible parking, as required by Missouri Revised Statutes § 301.142, violate Title II of the Americans With Disabilities Act, 42 U.S.C. § 12132. *McGarry v. Missouri Dep't of Revenue,* 7 F. Supp. 2d 1022 (W.D. Mo. 1998), *vacated for lack of federal jurisdiction,* 1999 U.S. Dist. LEXIS 22222 W.D. Mo. 1999), *reversed in part,* 281 F.3d 776 (8th Cir. 2002). The 1998 ruling accords with decisions in challenges to similar fees charged in other states. *See Dare v. California,* 191 F.3d 1167 (9th Cir. 1167 (9th Cir. 1999), *cert. denied,* 531 U.S. 1190, 121 S. Ct. 1187, 149 L. Ed. 2d 103 (2001); *Thompson v. Colorado,* 29 F. Supp. 2d 1226 (D. Colo. 1997), *vacated for lack of federal jurisdiction,* 278 F.3d 1020 (10th Cir. 2001), *cert. denied,* 122 S. Ct. 1960, 152 L. Ed. 2d 1021 (2002); *Duprey v. Connecticut,* 28 F. Supp. 2d 702 (D. Conn. 1998); *Thrope v. Ohio,* 19

F. Supp. 2d 816 (S.D. Ohio 1988); *Keef v. Nebraska Dep't of Motor Vehicles,* Docket 577 Page 536 (Dist. Ct. Lancaster Cty. Neb. Feb. 29, 2000), *appeal dismissed,* 262 Neb. 622, 634 N.W.2d 751 (2001); *Miller v. North Dakota Dep't of Transp.*, Case No. 96-C-1988 (N.D. Dist. Ct. Oct. 10, 1998).

The Court was later persuaded by developments in the Eighth Circuit, *see Alsbrook v. City of Maumelle*, 184 F.3d 999 (8th Cir. 1999) (en banc), that federal jurisdiction over Plaintiffs' claims was defeated by the Eleventh Amendment. Accordingly, this action was dismissed for lack of federal jurisdiction, and the earlier ruling that the placard fee is unlawful was vacated.

On appeal, the Eighth Circuit agreed that Plaintiffs' claim for reimbursement of placard fees is barred by the Eleventh Amendment, but ruled that the claim for declaratory and injunctive relief falls within the exception to Eleventh Amendment immunity established in *Ex parte Young,* 209 U.S. 123, 155-56, 52 L. Ed. 714 (1908). Accordingly, the dismissal of the claim for declaratory and injunctive relief was reversed, and the case remanded for further proceedings. *See Klingler v. Director, Dep't of Revenue,* 281 F.3d 776 (8th Cir. 2002).

The only remaining issue is whether to adhere to the 1998 decision that the fee for permanent removable windshield placards is unlawful. If so, declaratory and injunctive relief is the only remedy that this Court has jurisdiction to afford. The defense has not persuaded this Court to retreat from the prior ruling that the placard fee violates, and so is preempted by, federal law. Accordingly, it is appropriate to enter final declaratory and injunctive relief to compel prospective compliance with the federal prohibition of fees on rights of access. Therefore, it is:

ORDERED AND ADJUDGED:

1. That the requirement prescribed by Missouri Revised Statutes § 301.142 that fees be charged for permanent removable windshield placards allowing use of accessible parking is declared to be in violation of Title II of the Americans With Disabilities Act, and is preempted by the Supremacy Clause of the United States Constitution. This order does not affect the fees required for temporary windshield placards.

2. That the Director of the Missouri Department of Revenue and all others who act under the authority of the Director of the Missouri Department of Revenue in connection with the collection of placard fees are enjoined from any further collection of fees for permanent removable windshield placards, effective April 20, 2003, unless stayed.

3. That the Court reserves jurisdiction to enforce the declaratory and injunctive relief provided in this judgment.

4. That the Court reserves jurisdiction to consider a motion for attorney fees and costs, which shall be filed within fourteen days after Plaintiffs are notified Defendant will not appeal, or after a final decision of the Court of Appeals in favor of Plaintiffs.

Dated this 14th day of April, 2003, at Jefferson City, Missouri.

/s/ _____
WILLIAM A. KNOX
United States
Magistrate Judge

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
CENTRAL DIVISION

CHARLOTTE KLINGLER, et al.,	)	
Plaintiffs,	)	
v.	)	No. 96-4249-CV-C-WAK
DIRECTOR, DEPARTMENT OF REVENUE, STATE OF MISSOURI,	)	
Defendant.	)	

ORDER RECERTIFYING CLASS

Plaintiffs challenge the fee requirement under Revised Missouri Statutes § 301.142, as enforced by the Director of the Department of Revenue for the State of Missouri ("Director"), for a person with disabilities to receive a permanent removable windshield placard allowing use of accessible parking. By Order dated November 19, 1998, this Court granted the Plaintiffs' motion to certify this cause as a class action. Since that Order, this Court dismissed the claims of the certified class on grounds of Eleventh Amendment immunity. The Order of dismissal was thereafter reversed, in part, by the Eighth Circuit, which concluded that Plaintiffs' claim for declaratory and injunctive relief against the Director is not barred by the Eleventh Amendment. *See Klingler v. Director, Dep't of Revenue,* 281 F.3d 776 (8th Cir. 2002) .

Given the passage of time and the intervening events, and in response to the Director's renewed challenge on remand to the earlier certification order, the Court has

been persuaded to re-examine the propriety of class certification in this dispute. Plaintiffs have submitted Affidavits from each of the proposed class representatives and from class counsel. In reliance upon these Affidavits, and other filings that have been made by the parties during the course of this litigation, the Court makes the following findings of fact and conclusions of law:

Numerosity: In their complaint, Plaintiffs estimated that the class exceeds 100,000 members, who reside throughout the State of Missouri. Defendant does not deny that numerosity has been satisfied for the Plaintiff class, and has submitted an Affidavit by the Assistant Administrator of the Missouri Department of Revenue which confirms that the Director has issued well over 100,000 permanent removable windshield placards each year. Accordingly, the Court finds that the proposed class is sufficiently numerous to satisfy Rule 23(a)(1)'s requirement that the class be so numerous that the joinder of all members is impractical. *See Jackson v. Rapps,* 132 F.R.D. 226, 230 (W.D. Mo. 1990); *Wakefield v. Monsanto Co.,* 120 F.R.D. 112, 115 (E.D. Mo. 1988); *Dirks v. Clayton Brokerage Co.,* 105 F.R.D. 125, 131 (D. Minn. 1985).

Commonality: Common questions of fact are presented in that every member of the Plaintiff class has purchased or will purchase a permanent removable windshield placard, and will do so in the manner required by the Director. This means that every member of the class has completed and submitted or will complete and submit an application on a form designed by the Director, together with a medical certification of physical disability, signed by a licensed physician, and also on a form prescribed by the Director. Common questions of law are presented in that each placard purchaser shares the issue

of whether the fee on the permanent removable windshield placards is prohibited by the ADA and, if so, what remedy should be afforded for the State's violation of this prohibition. These common issues are sufficient to satisfy the commonality requirement of Rule 23(a)(2). *See DeBoer v. Mellon Mortg. Co.,* 64 F.3d 1171, 1174 (8th Cir. 1985), *cert. denied,* 517 U.S. 1156, 116 S. Ct. 1544, 134 L. Ed. 2d 648 (1996).

Typicality: The issues which are common to the members of the class, as discussed above, are equally shared by the proposed representative plaintiffs. No suggestion has been made that issues of law or fact differ with respect to any of the proposed class representatives, and no material difference appears which would render the claims of the proposed representatives atypical of the claims of the other members of the proposed class. Accordingly, Rule 23(a)(3)'s requirement of typicality is satisfied. *See General Tel. Co. v. Falcon,* 457 U.S. 147, 156, 102 S. Ct. 2364, 2370, 72 L. Ed. 2d 740 (1982); *Alpern v. Utilicorp United, Inc.,* 84 F.3d 1525, 1540 (8th Cir. 1996); *Jackson v. Rapps,* 132 F.R.D. at 231.

Adequacy of Representation: Rule 23(a)(4) requires the class representatives to fairly and adequately protect the interests of the class. This requires an examination of the willingness and ability of the class members to serve as representatives for the class, and an examination of the qualifications of the proposed class counsel. *See DeBoer,* 64 F.3d at 1175; *Paxton v. Union Nat'l Bank,* 688 F.2d 552, 562-63 (8th Cir. 1982), *cert. denied,* 460 U.S. 1083, 103 S. Ct. 1772, 76 L. Ed. 2d 345 (1983).

As to the latter, the Court has examined the Affidavits of Frederick M. Switzer, III, Stephen R. Senn, Robert J.

Antonello, and Robert G. Fegers. In addition, the Court has had an opportunity to examine the work product of these attorneys in considering motions to dismiss, for summary judgment, for class certification, and in connection with other issues which have been brought before the Court over the course of this litigation. The attorneys handling the case for the Plaintiffs have done an excellent job on behalf of their clients, and have knowledge and experience in dealing with the issues presented. Accordingly, the Court is persuaded that the team of attorneys is competent and sufficiently committed to satisfy the adequacy-of-counsel requirement.

Although the class representatives have not appeared personally to present evidence to demonstrate their suitability to serve as representatives, they have each filed affidavits which, on their face, demonstrate that they should be able to serve as adequate representatives of the class. The Court is advised that the State does not challenge the adequacy of these representatives under Rule 23(a)(4). Accordingly, the Court accepts that Charlotte Klingler, Charles Wehner, and Sheila Brashear are adequate representatives for the class.

Once the requisites for class certification under Rule 23(a) are satisfied, a class certification movant must demonstrate that at least one of the three conditions of Rule 23(b) are satisfied. Plaintiffs seek certification under Rule 23(b)(2), which is met when "the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole." Rule 23(b)(2).

The only claim which remains following the decision of the Eighth Circuit in the recent appeal is Plaintiffs' claim for declaratory and injunctive relief. This claim is based upon the dispute over the legality of the Director's requirement of fees for permanent removable windshield placards, which is an issue generally applicable to the class, and the proper resolution of this issue in the event that the fee is found to violate the ADA would be for injunctive and declaratory relief in favor of all who are affected by the fee requirement. Accordingly, certification is appropriate under Rule 23(b)(2). In granting certification under Rule 23(b)(2), this Court follows the several class certification decisions entered in challenges to placard fees charged by other states. *See Marcus v. Kansas Dep't of Revenue,* 206 F.R.D. 509 (D. Kan., 2002); *Duprey v. Connecticut DMV,* 191 F.R.D. 329 (D. Conn. 2000); *Thrope v. Ohio,* 173 F.R.D. 483 (S.D. Ohio 1997).

Under Rule 23(d)(2), notice is not mandatory to class members when certification is made under Rule 23(b)(2), but may be ordered if necessary for the protection of the class members or for the fair conduct of the action. *See Sperry Rand Corp. v. Larson,* 554 F.2d 868, 875-76 (8th Cir. 1977); *Access Now, Inc. v. AMH CGH, Inc.,* 2001 U.S. Dist. LEXIS 12876, 12 Am. Disabilities Cas. (BNA) 187 (S.D. Fla. 2001). Here, the Court finds no sufficient basis to require the State to incur the expense of notice, as the only relief available in this Court is declaratory and injunctive. Counsel have not identified any basis which might justify the expense of notice, and this Court is aware of no such basis. Accordingly, notice will not be required.

In seeking decertification of the class, the Director has argued that class certification is unnecessary, and that a

determination that the fee violates the ADA would be honored by the Director without need for class certification. In response, the Plaintiffs have contended that the necessity doctrine is not authorized by Rule 23, has been generally rejected by the Courts, and in any case should not be followed here because Plaintiffs contend the history of this case raises uncertainty as to whether the Director would categorically honor a ruling against the placard fee with respect to nonparties. Upon due consideration of these contentions, the Court is not persuaded that the necessity doctrine should be relied upon to decertify the class.

Based upon the foregoing, it is

ORDERED:

1. That the Director's motion to decertify the class is DENIED.

2. That the Court recertifies the following defined class:

> All purchasers of permanent removable windshield placards, pursuant to Missouri Revised Statutes Section 301.142, since January 26, 1992, and all persons who will in the future be required to pay money for such placards until and unless declaratory and injunctive relief prohibits the requirement of payment as a condition of full access to parking accommodations reserved for persons with disabilities.

3. Charlotte A. Klingler, Charles E. Wehner, and Sheila Brashear shall serve as representatives of the class.

4. Fredrick M. Switzer, III (of the firm Danna McKitrick, P.C.); J. Davis Connor and Stephen R. Senn (of

the firm Peterson & Myers, P.A.); and Robert J. Antonello and Robert G. Fegers (of the firm Antonello & Fegers) shall serve as class counsel.

Dated this 14th day of April, 2003, at Jefferson City, Missouri.

/s/ _____
WILLIAM A. KNOX
United States
Magistrate Judge

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 03-2345

Charlotte Klingler, et al.,	*	
	*	
Appellees,	*	Order Denying Petition
vs.	*	for Rehearing and for
	*	Rehearing En Banc
Director, Department of Revenue, State of Missouri,	*	
	*	
Appellant.	*	

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

Judge Smith, Judge Colloton, and Judge Gruender would grant the petition for rehearing en banc.

(5128-010199)

August 2, 2004

Order Entered at the Direction of the Court:

Clerk, U.S. Court of Appeals, Eighth Circuit

TEXT OF CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

United States Constitution

The Commerce Clause of the United States Constitution provides:

> The Congress shall have Power . . . To regulate Commerce . . . among the several States . . . .

The Eleventh Amendment to the United States Constitution provides:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

Sections 1 and 5 of the Fourteenth Amendment to the United States Constitution provide:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.
>
> . . .
>
> Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

Federal Statutes

42 U.S.C. § 12101 provides:

(a) Findings

The Congress finds that –

(1) some 43,000,000 Americans have one or more physical or mental disabilities, and this number is increasing as the population as a whole is growing older;

(2) historically, society has tended to isolate and segregate individuals with disabilities, and, despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem;

(3) discrimination against individuals with disabilities persists in such critical areas as employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services;

(4) unlike individuals who have experienced discrimination on the basis of race, color, sex, national origin, religion, or age, individuals who have experienced discrimination on the basis of disability have often had no legal recourse to redress such discrimination;

(5) individuals with disabilities continually encounter various forms of discrimination, including outright intentional exclusion, the discriminatory effects of architectural, transportation, and communication barriers, overprotective rules and policies, failure to make modifications to existing facilities and practices, exclusionary

qualification standards and criteria, segregation, and relegation to lesser services, programs, activities, benefits, jobs, or other opportunities;

(6) census data, national polls, and other studies have documented that people with disabilities, as a group, occupy an inferior status in our society, and are severely disadvantaged socially, vocationally, economically, and educationally;

(7) individuals with disabilities are a discrete and insular minority who have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society, based on characteristics that are beyond the control of such individuals and resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society;

(8) the Nation's proper goals regarding individuals with disabilities are to assure equality of opportunity, full participation, independent living, and economic self-sufficiency for such individuals; and

(9) the continuing existence of unfair and unnecessary discrimination and prejudice denies people with disabilities the opportunity to compete on an equal basis and to pursue those opportunities for which our free society is justifiably famous, and costs the United States billions of dollars in unnecessary expenses resulting from dependency and nonproductivity.

(b) Purpose

It is the purpose of this chapter –

(1) to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities;

(2) to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities;

(3) to ensure that the Federal Government plays a central role in enforcing the standards established in this chapter on behalf of individuals with disabilities; and

(4) to invoke the sweep of congressional authority, including the power to enforce the fourteenth amendment and to regulate commerce, in order to address the major areas of discrimination faced day-to-day by people with disabilities.

42 U.S.C. § 12132 provides:

Subject to the provisions of this subchapter, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

42 U.S.C. § 12202 provides:

A State shall not be immune under the eleventh amendment to the Constitution of the United States from an action in Federal or State court of competent jurisdiction for a violation of this chapter. In any action against a State for a violation of the requirements of this chapter,

remedies (including remedies both at law and in equity) are available for such a violation to the same extent as such remedies are available for such a violation in an action against any public or private entity other than a State.

(2)

Supreme Court U.S.
FILED
DEC 1 - 2004
OFFICE OF THE CLERK

04-585
NO. 04-585

IN THE
SUPREME COURT OF THE UNITED STATES

CHARLOTTE KLINGLER, *ET AL.*,
Petitioners,

v.

DIRECTOR, DEPARTMENT OF REVENUE,
STATE OF MISSOURI,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF FOR RESPONDENT DIRECTOR OF REVENUE IN RESPONSE TO PETITION

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QUESTIONS PRESENTED

1. Whether, in 42 U.S.C. § 12132 (2000), Congress barred states from collecting a fee for issuing a placard, available only to those who are disabled, manifesting the eligibility of the purchaser to use parking spaces reserved for the disabled.

2. Whether Congress has authority under Section 5 of the Fourteenth Amendment to abrogate the states' Eleventh Amendment immunity, by virtue of Title II of the Americans with Disabilities Act of 1990, 42 U.S.C. § 12101-12213 (2000), from suit seeking to prevent a state from charging a fee for a placard, available only to the disabled, that is a nonexclusive means of manifesting a person's eligibility to use parking spaces reserved for use by the disabled.

3. Whether Congress has authority under the Commerce Clause to abrogate the states' Eleventh Amendment immunity, by virtue of Title II of the Americans with Disabilities Act of 1990, 42 U.SC. § 12101-12213 (2000), from suit seeking to prevent a state from charging a fee for a placard, available only to the disabled, that is a nonexclusive means of manifesting a person's eligibility to use parking spaces reserved for use by the disabled.

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INTRODUCTION

The U.S. Court of Appeals for the Eighth Circuit held that Congress lacked authority under the Commerce Clause to enact Title II of the Americans with Disabilities Act ("ADA"), 42 U.S.C. §§ 12101-12213 (2000), insofar as Title II is applied to a state charging for issuance of parking placards that are a nonexclusive means for disabled persons to demonstrate their qualification to use parking places reserved for their use. In doing so, the Eighth Circuit cited its precedent in *Alsbrook v. City of Manuelle*, 184 F.3d 999 (8th Cir. 1999) (en banc), *cert. dismissed*, 529 U.S. 1001 (2000), holding that Congress lacked authority to act under Section 5 of the Fourteenth Amendment – a decision the scope of which, at least, is called into question by this Court's decision in *Tennessee v. Lane*, 124 S.Ct. 1978 (2004). But in reaching the question of congressional authority, regardless of the source, the Eighth Circuit bypassed entirely the question whether such a charge actually would violate the statute.

The Director of Revenue of Missouri concurs with the petitioners that the Eighth Circuit ruled without the benefit of *Tennessee v. Lane*, and that *Lane* affects the validity of the broad declaration made in *Alsbrook*. Thus the Director concurs that if the question of congressional authority must be reached, the Eighth Circuit should reconsider it in light of *Lane*. *See* Petition at 5-7. But there was a means of resolving this case without reaching the constitutional question. This Court should grant the petition, vacate the Eighth Circuit's decision, and remand, as petitioners request. But rather than remand solely to reconsider in light of

Lane, the Court should instruct the Eighth Circuit to first decide whether what Missouri does is covered by the ADA at all.

STATEMENT

Missouri Rev. Stat. § 301.142 (Supp. 2003) provides two means by which disabled persons can obtain official, visible confirmation of their eligibility to use parking spaces reserved for the disabled. Under § 301.142.3, physically disabled persons who own motor vehicles, those who use their motor vehicles to transport physically disabled members of their households, and those who use their motor vehicles at least 50% of the time to transport a physically disabled person, may obtain specially marked license plates that authorize them to park in disabled access parking spaces. These license plates may be obtained from the Director of the Missouri Department of Revenue at no additional fee beyond that ordinarily charged for license plates. Mo. Rev. Stat. § 301.142.4.

Under § 301.142.5, at issue here, physically disabled persons, parents or guardians of physically disabled persons, and any entity that transports more than one physically disabled person may obtain a removable windshield placard that authorizes use of disabled access parking spaces. The fee for each placard is $2.00 per year.

Charlotte A. Klingler, Vicki L. McGarry, and Charles E. Wehner filed this action against the Director of the Missouri Department of Revenue. They alleged that the $2.00 fee violated the Americans with

Disabilities Act and regulations issued by the United States Department of Justice. The plaintiffs sought: (1) a declaration that the placard fee was unlawful; (2) an injunction against further collection of the fee; and (3) reimbursement of the fee to proposed class members who had paid it.

The district court denied the Director's motion for summary judgment and granted the petitioners' motion, concluding that the placard fee charged to the three individual plaintiffs violated the surcharge prohibition of 28 C.F.R. § 35.130(f) (2004). The district court also certified a class of:

> All purchasers of permanent, removable windshield placards, pursuant to Missouri Revised Statutes Section 301.142 since January 26, 1992, and all persons who will in the future be required to pay money for such placards until and unless declaratory and injunctive relief prohibits the requirement of payment as a condition of full access to parking accommodations reserved for persons with disabilities.

After the Eighth Circuit issued its decision in *Alsbrook v. City of Maumelle*, the district court granted the Director's motion for judgment on the pleadings and dismissed this case on the ground that application of the ADA to states was not a proper exercise of Congress's power under § 5 of the Fourteenth Amendment and, consequently, did not validly abrogate the states' Eleventh Amendment immunity. Plaintiffs appealed.

The Eighth Circuit affirmed the dismissal of plaintiffs' claims for damages, but determined that the Eleventh Amendment did not generally bar plaintiffs from seeking declaratory and injunctive relief under the ADA pursuant to *Ex parte Young*, 209 U.S. 123, 155-56 (1908). *Klingler v. Director, Department of Revenue*, 281 F.3d 776, 777 (8th Cir. 2002). That court then remanded the case for further proceedings. *Id.*

On remand, the district court again held that the placard fee violated the ADA, confirmed its summary judgment in favor of plaintiffs and denial of summary judgment to the Director, and declared that the placard fee violates Title II of the ADA and is preempted by the Supremacy Clause. Pet. App. at 19. The court also enjoined the Director from any further collection of the placard fee. *Id.*

The district court stayed its judgment pending appeal, and the Director filed a timely notice of appeal.

The Eighth Circuit held that the question of congressional authority under Section 5 of the Fourteenth Amendment to enact Title II of the ADA was resolved in *Alsbrook*. Pet. App. at 4-5. The court then rejected the argument that even if Congress lacked authority under the Fourteenth Amendment, it could proceed under the Commerce Clause. *See* Petition Appendix at App. 5-12.

RESPONSE TO REASONS TO GRANT THE PETITION

1. The Director does not dispute that this Court should remand this case to the Eighth Circuit for reconsideration. As to the question of congressional authority under the Fourteenth Amendment, the Eighth Circuit relied below solely on its *en banc* decision in *Alsbrook*. That broad decision – holding that Congress could not, in Title II, abrogate in any respect the states' Eleventh Amendment immunity – cannot be reconciled with *Tennessee v. Lane*. Perhaps the Eighth Circuit will conclude that although congressional authority under the Fourteenth Amendment extends to access-to-the-courts claims such as the one made in *Lane*, it does not extend so far as to permit Congress to ban states from charging a nominal fee for a parking placard. Only then would it make sense for the Eighth Circuit to reach the Commerce Clause issue.

But the Director is not satisfied with petitioners' proposal that the matter be remanded solely to complete that analysis, for there is a preliminary step – one that the Eighth Circuit skipped entirely.

When interpreting a statute, courts must give it a construction, if reasonably possible, that avoids constitutional doubts. *Harris v. United States*, 122 S.Ct. 2406, 2413 (2002). And courts are obligated to avoid deciding constitutional questions needlessly. *Christopher v. Harbury*, 122 S.Ct. 2179, 2188 (2002). The Eighth Circuit violated these very basic rules. It failed to address the Director's argument that both the ADA and the regulation invoked by the plaintiffs may be

reasonably interpreted not to prohibit Missouri's placard fee.

Title II of the ADA provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity or be subjected to discrimination by any such entity." 42 U.S.C. § 12132. Assuming that the petitioners are "qualified individual[s] with . . . disabilit[ies]," the state's charge for removable windshield placards that authorize parking in disabled access parking spaces does not exclude plaintiffs from participation in, or deny them access to, any state service, program, or activity, and does not subject plaintiffs to discrimination.

The benefits cited by petitioners – access to parking spaces set aside for individuals with disabilities, and placards manifesting eligibility to use those spaces – are available only to individuals with disabilities. And charging a nominal fee for placards that are a nonexclusive means of manifesting eligibility does not make the placard service discriminatory, for individuals without disabilities have no access to the placards at any price.

Rather than specifically basing their claim on any language of the ADA itself, petitioners relied below on a regulation promulgated by the Department of Justice to implement the ADA, 28 C.F.R. § 35.130(f). That regulation merely articulates the rule that the discrimination barred by Title II of the ADA includes

the imposition of fees to cover the costs of nondiscriminatory treatment:

> A public entity may not place a surcharge on a particular individual with a disability or any group of individuals with disabilities to cover the costs of measures, such as the provision of auxiliary aids or program accessibility, that are required to provide that individual or group with the nondiscriminatory treatment required by the [ADA] or this part.

But again, charging for windshield placards does not discriminate against individuals with disabilities vis-à-vis individuals without disabilities; individuals without disabilities (other than those who transport the disabled) simply cannot obtain such placards.

The Eighth Circuit never considered whether the placard fee violated either the ADA or 28 C.F.R. § 35.130(f). If the Director is right, and the fee is permissible under the statute and regulations, there was no reason for the Eighth Circuit to reach the question of congressional authority. Thus the case should be remanded with instructions to consider whether the constitutional question can be avoided – *before* considering whether this particular application of Title II is permissible under *Tennessee v. Lane*.

2. Because the Eighth Circuit did not address *Lane*, and because the *Lane* holding is limited, this is not an appropriate case in which to consider any conflict among the circuits. *Lane* demonstrates that the constitutionality of congressional abrogation of the

states' Eleventh Amendment immunity in Title II of the ADA may not be an "all or nothing" proposition. But all of the cases the petitioners cite fit into two categories: those, like *Alsbrook*, that treat it as an "all or nothing" proposition; and the more recent ones that apply *Lane* to particular statutes and circumstances. The Eighth Circuit has never taken a post-*Lane* position, so we simply do not know whether it is in conflict with any post-*Lane* decision by any other court. Taking up this case on the merits on the basis of a conflict among the circuits would be premature.

3. This is not the right case in which to address any such conflict for another reason: in light of the position already taken by the State of Missouri in support of the constitutionality of Title II in *Tennessee v. Lane*, the Respondent is not in a position to defend the position taken by the Eighth Circuit here. *See* Brief of the States of Minnesota, etc., in *Tennessee v. Lane*, No. 02-1667 (2004).

True, here, in the lower courts the Director asserted constitutional infirmities in the ADA, thus preserving an issue that was – and is – being litigated elsewhere, and that had apparently been resolved in the Eighth Circuit in *Alsbrook*. Failure to do so might have left the Director with a court order requiring her to abandon charges for placards, even if this Court ultimately held that Title II – either in its entirety or as applied to similar cases – could not or did not constitutionally abrogate the states' immunity in these circumstances. Certiorari would be better granted in a case in which there is a party who has not previously

taken the position in this Court that Missouri took in *Lane*.

And there will be such an opportunity. In the last few weeks, courts have issued rulings in a number of pending cases in which the constitutionality of possibly similar applications of Title II of the ADA are at issue. Among them are:

- *Miller v. King*, 384 F.3d 1248 (11th Cir. 2004), holding that Congress does not have authority under 14th Amendment to abrogate the immunity of state defendants from monetary claims under Title II. Petitions for rehearing en banc were filed by the plaintiff and by the United States on October 27 and October 29, 2004, respectively.
- *Badillo-Santiago v. Naveira-Merly*, 378 F.3d 1 (1st Cir. 2004), where the court applied *Tennessee v. Lane*, and held that Title II was a valid exercise of Congress's power under Section 5 of the 14th Amendment because at least one of plaintiff's claims implicated his right of access to courts. The ADA claim was reinstated and the case apparently is proceeding on remand.
- *Jamison v. Delaware*, 2004 WL 2345183 (D. Del. 2004), holding that Congress had no power under Section 5 of the 14th Amendment to enact Title II.
- *Johnson v. Southern Conn. State Univ.*, 2004 WL 2377225 (D.Conn 2004), holding that a damages claim under Title II against a state is available only for a violation of a fundamental right.

CONCLUSION

For the reasons stated above, the Court should grant the petition, vacate the Eighth Circuit's decision, and remand for consideration of the Director's argument that the fee for disabled parking placards is permissible under the statute – and, if that is not the case, to then consider whether the Title II of the ADA is a valid exercise of congressional authority in light of *Tennessee v. Lane*.

Respectfully submitted,

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December 1, 2004

Supreme Court, U.S.
FILED
FEB 2 - 2005
OFFICE OF THE CLERK

No. 04-585

In the Supreme Court of the United States

CHARLOTTE KLINGLER, CHARLES WEHNER, AND SHEILA BRASHEAR, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED, PETITIONERS

v.

DIRECTOR, DEPARTMENT OF REVENUE, STATE OF MISSOURI, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTIONS PRESENTED

1. Whether a Justice Department regulation that prohibits charging individuals with disabilities for the cost of program-accessibility measures that are "required to provide that individual or group with the nondiscriminatory treatment required by" the Americans with Disabilities Act, 28 C.F.R. 35.130(f), applies to Missouri's fee for obtaining portable handicap parking placards.

2. Whether Title II of the Americans with Disabilities Act of 1990, 42 U.S.C. 12131 *et seq.*, is a proper exercise of Congress's power under Section 5 of the Fourteenth Amendment, as applied to cases implicating the right to travel and equal access to governmental services and programs.

3. Whether Title II of the Americans with Disabilities Act of 1990, 42 U.S.C. 12131 *et seq.*, is a proper exercise of Congress's Commerce Clause power, as applied to regulating the imposition of surcharges for accessible motor vehicle parking.

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In the Supreme Court of the United States

No. 04-585

CHARLOTTE KLINGLER, CHARLES WEHNER, AND SHEILA BRASHEAR, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED, PETITIONER

v.

DIRECTOR, DEPARTMENT OF REVENUE, STATE OF MISSOURI, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-16) is reported at 366 F.3d 614. The judgment of the district court (Pet. App. 17-19) is unreported.

JURISDICTION

The court of appeals entered its judgment on May 3, 2004. A petition for rehearing was denied on August 2, 2004. Pet. App. 27. The petition for a writ of certiorari was filed on October 28, 2004. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. The Americans with Disabilities Act of 1990 (Disabilities Act), 42 U.S.C. 12101 *et seq.*, established a "comprehensive national mandate for the elimination of discrimination against individuals with disabilities." 42 U.S.C. 12101(b)(1). Congress found that "historically, society has tended to isolate and segregate individuals with disabilities," and that "such forms of discrimination * * * continue to be a serious and pervasive social problem." 42 U.S.C. 12101(a)(2). Congress specifically found that discrimination against persons with disabilities "persists in such critical areas as employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services." 42 U.S.C. 12101(a)(3). In addition, Congress found that persons with disabilities

> continually encounter various forms of discrimination, including outright intentional exclusion, the discriminatory effects of architectural, transportation, and communication barriers, overprotective rules and policies, failure to make modifications to existing facilities and practices, exclusionary qualification standards and criteria, segregation, and relegation to lesser services, programs, activities, benefits, jobs, or other opportunities.

42 U.S.C. 12101(a)(5). Congress concluded that persons with disabilities

> have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society, based on characteristics that

> are beyond the control of such individuals and resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society.

42 U.S.C. 12101(a)(7). Based on those findings, Congress "invoke[d] the sweep of congressional authority, including the power to enforce the fourteenth amendment" to enact the Disabilities Act. 42 U.S.C. 12101(b)(4).

The Disabilities Act targets three particular areas of discrimination against persons with disabilities. Title I, 42 U.S.C. 12111-12117, addresses discrimination by employers affecting interstate commerce; Title II, 42 U.S.C. 12131-12165, addresses discrimination by governmental entities in the operation of public services, programs, and activities, including transportation; and Title III, 42 U.S.C. 12181-12189, addresses discrimination in public accommodations operated by private entities. This case arises under Title II of the Disabilities Act, which provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. 12132. A "public entity" is defined to include "any State or local government" and its components. 42 U.S.C. 12131(A) and (B). Title II may be enforced through private suits against public entities. 42 U.S.C. 12133. Congress expressly abrogated the States' Eleventh Amendment immunity to private suits in federal court. 42 U.S.C. 12202.

b. Congress charged the Attorney General with issuing regulations to implement the provisions of Title II. See 42 U.S.C. 12134(a); see generally 28 C.F.R.

Pt. 35. Those regulations, Congress further directed, "shall include standards applicable to facilities and vehicles covered by this part" that are "consistent with the minimum guidelines and requirements issued by the Architectural and Transportation Barriers Compliance Board." 42 U.S.C. 12134(c). To ensure that newly constructed facilities are accessible to people with disabilities, the regulations require that, "[i]f parking spaces are provided for self-parking by employees or visitors, or both, then accessible spaces * * * shall be provided in each such parking area" in a number proportional to the number of total parking spaces. 28 C.F.R. Pt. 36, App. A, § 4.1.2(5)(a); see 28 C.F.R. 35.151(c) (incorporating standards). Each space must be "designated as reserved by a sign showing the symbol of accessibility." 28 C.F.R. Pt. 36, App. A, § 4.6.4. Accessible parking must also be provided in existing facilities when necessary to ensure that programs, services, and activities of an entity are accessible to people with disabilities. See 28 C.F.R. 35.150.

At issue in this case is a general regulatory prohibition that forbids public entities from "plac[ing] a surcharge on a particular individual with a disability or any group of individuals with disabilities to cover the costs of measures, such as the provision of auxiliary aids or program accessibility, that are required to provide that individual or group with the nondiscriminatory treatment required by the Act or this part." 28 C.F.R. 35.130(f).

2. Missouri provides qualifying persons handicap license plates at the same price that is charged for all other license plates issued by the State. To obtain a portable handicap parking placard, an individual with a disability must pay an annual fee of $2. Pet. App. 3; Mo.

Ann. Stat. §§ 301.142.4, 301.142.5 (West Supp. 2004). Fees assessed on parking placards generate approximately $400,000 in annual income for the State. Pet. App. 11.

Petitioners filed a class action lawsuit against the Director of the Missouri Department of Revenue challenging the surcharge as violating Title II of the Disabilities Act and its implementing regulations and seeking injunctive and monetary relief. Pet. App. 2. The district court dismissed the case based on controlling Eighth Circuit precedent holding that Title II of the Disabilities Act, in its entirety, exceeded Congress's legislative power under Section 5 of the Fourteenth Amendment. Pet. App. 2 (citing *Alsbrook* v. *City of Maumelle*, 184 F.3d 999 (8th Cir. 1999) (en banc), cert. granted, 528 U.S. 1146, cert. dismissed, 529 U.S. 1001 (2000)); Pet. 2-3. The court of appeals affirmed dismissal of the claim for monetary relief, but remanded for consideration of declaratory and injunctive relief pursuant to *Ex parte Young*, 209 U.S. 123 (1908). See Pet. App. 2. On remand, the district court held that the fee imposed for portable placards violates Title II's surcharge regulation and enjoined collection of the fee. *Id.* at 17-19.

3. The court of appeals reversed. Pet. App. 1-16. The court declined to address whether, as a matter of statutory and regulatory construction, the placard fee violated Title II and the surcharge regulation, holding instead that "this is one of those rare occasions where the appropriate resolution of the constitutional issue is reasonably straightforward and determinate and the resolution of the statutory issue is, by contrast, difficult and complex." *Id.* at 4.

The court then ruled that Congress lacked the legislative authority to enact Title II. The court first reaffirmed its view that Title II as a whole is not a proper exercise of Congress's power to enforce the Fourteenth Amendment. Pet. App. 4. The court next held that Congress lacked authority under the Commerce Clause to regulate the collection of Missouri's surcharge. *Id.* at 5-12. The court reasoned that Missouri's collection of hundreds of thousands of dollars annually in regulating the use of motor vehicles was not sufficiently "commercial" to fall within the reach of the Commerce Clause. *Id.* at 6. The court also found significant Congress's failure to make "express findings" in the Disabilities Act about the particularized impact of parking placard fees on interstate commerce. *Id.* at 7-8. Finally, the court reasoned that the placard fee did not implicate interstate commerce because most persons would be willing to pay the fee and thus the fee would not "reduce the number of placard-possessing disabled people to such an extent that interstate commerce would be substantially affected." *Id.* at 11.

Judge Richard Arnold dissented. Pet. App. 12-16. He would have held that Title II's application to parking placard fees reflects a proper exercise of Congress's Commerce Clause power. He noted that, under Missouri's fee provision, persons with disabilities "are being required to pay for their access to interstate commerce while non-disabled individuals are not." *Id.* at 13. He further reasoned that cases from this Court upholding statutory prohibitions on racial discrimination as valid Commerce Clause legislation would equally sustain Title II's application here because "the state has made it more difficult for [persons with disabilities] to enter the store" and "more costly for certain disabled individuals

to gain convenient access to places of business where commercial activity affecting interstate commerce is taking place." *Id.* at 16.

4. Following the panel's decision, the United States intervened to defend the constitutionality of Title II and filed a petition for rehearing and rehearing en banc.[1] That petition argued, *inter alia*, that rehearing was warranted based on this Court's intervening decision in *Tennessee* v. *Lane*, 124 S. Ct. 1978 (2004), which upheld Title II as valid Section 5 legislation in the context of access to the courts claims, and thereby abrogated *Alsbrook*'s holding that Title II as a whole is unconstitutional. The court of appeals denied rehearing and rehearing en banc without opinion. Pet. App. 27. Judges Smith, Colloton, and Gruender would have granted the petition for rehearing en banc. *Ibid.*

ARGUMENT

1. The United States agrees with petitioners (Pet. 5-7) and with respondent, the Director of the Missouri Department of Revenue (Missouri) (Missouri Cert. Br. 5-10), that the petition for a writ of certiorari should be granted, the judgment below vacated, and the case remanded for further consideration in light of this Court's decision in *Tennessee* v. *Lane*, 124 S. Ct. 1978 (2004), and in light of respondent Missouri's change of position on the legal question of Congress's authority to

[1] The United States had intervened in the earlier appeal, pursuant to 28 U.S.C. 2403, to defend against the State's challenge to the constitutionality of Title II's abrogation of Eleventh Amendment immunity. After the court of appeals resolved that question pursuant to *Alsbrook*, the United States discontinued its participation in the case. The United States was not notified that a new constitutional challenge concerning whether Title II is valid Commerce Clause legislation had been raised in the litigation.

enact Title II of the Disabilities Act pursuant to Section 5 of the Fourteenth Amendment.

The court of appeals held, in a per curiam opinion, that Title II is not proper Section 5 legislation based entirely on prior precedent that had invalidated Title II across the board. *Klingler* v. *Director, Mo. Dep't of Revenue*, 281 F.3d 776 (8th Cir. 2002); see Pet. App. 2; see also *Alsbrook* v. *City of Maumelle*, 184 F.3d 999 (8th Cir. 1999) (en banc), cert. granted, 528 U.S. 1146, cert. dismissed, 529 U.S. 1001 (2000). That holding is irreconcilable with this Court's decision last Term in *Tennessee* v. *Lane*, *supra*, which ruled that Title II responded to an established record of "pervasive unequal treatment in the administration of state services and programs, including systematic deprivations of fundamental rights," 124 S. Ct. at 1989, rendering the unconstitutional treatment of individuals with disabilities in the "provision of public services and access to public facilities * * * an appropriate subject for prophylactic legislation," *id.* at 1992. Contrast *Alsbrook*, 184 F.3d at 1008-1010 (legislative record does not support prophylactic legislation).

In addition, the court of appeals' sweeping invalidation of Title II in all of its applications in *Alsbrook*, is evidenced both by its opinion in that case, which presented a claim of discrimination in the licensing of law enforcement officers, and its per curiam extension of that holding to the very different factual and legal context presented by this case. That aspect of its decision cannot survive this Court's holding in *Lane* that courts must analyze whether Title II is appropriate Section 5 legislation as applied to the particular legal context in which each case arises. 124 S. Ct. at 1992-1993.

Although the United States' petition for rehearing and for rehearing en banc requested that the court of appeals' reconsider its decision in light of *Lane*, the court of appeals declined that request, allowing its now abrogated rulings of law to stand. Adjudicating the constitutionality of an Act of Congress is "the gravest and most delicate duty" that courts are "called upon to perform." *Rostker* v. *Goldberg*, 453 U.S. 57, 64 (1981) (quoting *Blodgett* v. *Holden*, 275 U.S. 142, 148 (1927) (opinion of Holmes, J.)). Fundamental and constitutionally rooted principles of judicial restraint, combined with respect for the coordinate Branches of Government that made Title II law, require more than unreasoned silence before major civil rights legislation is held unconstitutional.[2] Accordingly, vacatur of the court of appeals' decision, with instructions to reconsider the decision in light of *Tennessee* v. *Lane*, *supra*, is warranted. See *Lawrence* v. *Chater*, 516 U.S. 163, 170 (1996) (this Court has "never held lower court briefing to bar [its] review and vacatur where the lower court's order shows no sign of having applied the precedents that were briefed"); *Robinson* v. *Story*, 469 U.S. 1081 (1984) (vacating and remanding a case for reconsideration in light of decision by this Court that was handed down three months before the court of appeals' decision).

Vacatur of the judgment below and remand is also warranted in light of Missouri's critical change in its position on the constitutionality of Title II. While

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[2] That is particularly true when, as here, the United States was unable to obtain this Court's review of the underlying *Alsbrook* decision due to the parties' settlement of that case. See 529 U.S. 1001 (2000) (order dismissing the previously granted petition for a writ of certiorari).

Missouri had previously argued to the court of appeals that Title II is not valid Section 5 legislation, Missouri changed its legal position in an *amicus curiae* brief filed with this Court in *Lane*, where it joined a number of other States in arguing that Title II is valid Section 5 legislation in all of its applications. See Amicus Br. of the State of Minnesota, *et al.*, *Tennessee* v. *Lane*, *supra* (No. 02-1667) see also Missouri Cert. Br. 8-9 (confirming the change in position). As a result of that significant development, Missouri has itself recommended that this Court grant the petition, vacate the judgment below, and remand for further proceedings, Missouri Cert. Br. 8-9, explaining that Missouri is no longer "in a position to defend the position taken by the Eighth Circuit here," *id.* at 8. Importantly, that concession that Title II is valid Section 5 legislation rendered entirely unnecessary the court of appeals' ruling addressing whether Title II falls within Congress's Commerce Clause power. See *Lawrence*, 516 U.S. at 167 (vacatur and remand may be appropriate in light of "confessions of error or other positions newly taken by the Solicitor General and state attorneys general") (citations omitted).

2. In the alternative, the petition for a writ of certiorari should be denied. First, with respect to the court's holding that Title II is not valid Section 5 legislation, this is the first court of appeals' decision since *Lane* arising in the context of parking placards and their impact on access to public services and the right to travel. Not only is there no considered opinion of the Eighth Circuit applying *Lane* for this Court to review, there also is no decision of any other court of appeals or district court analyzing the question.

Second, with respect to the court of appeals' ruling that Title II is not valid Commerce Clause legislation, that decision was issued without notice to or the participation of the United States in defense of the constitutionality of the law, as required by 28 U.S.C. 2403(a), and Federal Rule of Appellate Procedure 44(a). The issue also received extremely limited briefing by the parties,[3] and the United States raised additional and substantial arguments in favor of the statute's constitutionality in its petition for rehearing. See U.S. Pet. for Reh'g and Reh'g En Banc 6-14.

Nor is there a conflict in court rulings on the Commerce Clause question that merits this Court's plenary review at this juncture. In *State* v. *Rendon*, 832 So. 2d 141 (Fla. Dist. Ct. App. 2002), review denied, 851 So. 2d 729 (Fla. 2003), an intermediate state court ruled that the Department of Justice exceeded its rulemaking authority in extending the surcharge regulation to cover modest fees for parking placards. In so holding, the court reasoned that construing Title II to preclude such charges would raise a serious constitutional question under the Commerce Clause. *Id.* at 145-146 & n.5. However, this Court subsequently vacated that judgment and remanded for reconsideration in light of *Lane*. See 124 S. Ct. 2387 (2004). That same course of action, rather than plenary review, is appropriate here.

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[3] In its opening brief, Missouri did not even mention the Commerce Clause, let alone raise it as a question presented. In its reply brief, Missouri discussed the issue in response to petitioners' presentation of the Commerce Clause as an alternative grounds for affirmance, but in so doing never cited *United States* v. *Lopez*, 514 U.S. 549 (1995), or *United States* v. *Morrison*, 529 U.S. 598 (2000), which establish the proper constitutional framework for considering the Commerce Clause challenge.

Third, the court of appeals' consideration of the constitutionality of Title II was premature. Both parties had fully briefed and argued to the court the antecedent question of whether, as a matter of statutory and regulatory construction, Title II proscribes Missouri's surcharge for portable parking placards. "If there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that [courts] ought not to pass on questions of constitutionality * * * unless such adjudication is unavoidable." *Spector Motor Serv., Inc.* v. *McLaughlin*, 323 U.S. 101, 105 (1944); see also *Lyng* v. *Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 445 (1988) (a "fundamental and longstanding principle of judicial restraint requires that courts avoid reaching constitutional questions in advance of the necessity of deciding them").

That oversight is particularly perplexing in light of the fact that this Court itself applied that important principle of judicial restraint and constitutional avoidance in declining to address essentially the same question presented here in *Board of Trustees of the University of Alabama* v. *Garrett*, 531 U.S. 356 (2001). See *id.* at 360 n.1 (declining to address Congress's power to enact Title II because of the unresolved statutory question of whether Title II applies to employment). The preliminary statutory question of whether Title II and its surcharge regulation prohibits Missouri's parking placard fee thus stands as a significant obstacle to this Court's consideration of the questions presented by petitioners in this case.

In fact, as the United States previously indicated in its brief in opposition to certiorari in *Thompson* v. *Colorado*, No. 01-1024—another case seeking review of Congress's power to enact Title II of the Disabilities Act

that arose in the context of parking placard fees and in which this Court denied further review, see 535 U.S. 1077 (2002)—the Justice Department interprets its regulation as *not* proscribing the fee charged by Missouri here. That is because such placards generally are not "required," 28 C.F.R. 35.130(f), to provide non-discriminatory access to buildings or facilities. Missouri already provides such access for drivers with disabilities by offering special license plates at no additional charge, which allow drivers with disabilities, their family members, and non-profit groups that transport individuals with disabilities to utilize the parking spots reserved for persons with disabilities. See Mo. Ann. Stat. § 301.142(5) (West Supp. 2004). The placard fee here thus can be understood as a fee for an alternative means of providing access, but not as a surcharge for the program accessibility that is "required" by the Disabilities Act. 28 C.F.R. 35.130(f). The Justice Department's interpretation of its own regulation merits substantial deference. See *Auer* v. *Robbins*, 519 U.S. 452, 461 (1997).

CONCLUSION

The petition for a writ of certiorari should be granted, the judgment of the court of appeals vacated, and the case remanded for reconsideration in light of *Tennessee* v. *Lane*, 124 S. Ct. 1978 (2004), and respondent Missouri's change of position on the legal question of Congress's authority to enact Title II of the Disabili-

ties Act pursuant to its power under Section 5 of the Fourteenth Amendment. In the alternative, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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FEBRUARY 2005